Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

RACHAEL NELSON,
N/K/A RACHAEL MARSH,

Petitioner,

v.

- BLAIN NELSON,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Kansas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is a waiver of the parental preference doctrine by a parent binding when the parent is coerced or under duress, or when the minor children do not consent to the waiver?

When a parent is told that social services will file a child in need of care case unless her children are placed with a third party and she waives her parental preference rights, does coercion and duress exist which would void any such waiver of the parental preference doctrine by the parent?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

Rachael Nelson, n/k/a Rachael Marsh, petitioner;

Blain Nelson, respondent;

Melissa McMullen, intervenor.

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The opinion of the Kansas Court of Appeals is reported at 34 Kan. App.2d 879, 125 P.3d 1081 (2006) and is reprinted in the Appendix at 1. By order filed May 9, 2006, the Kansas Supreme Court denied the petition for review, as seen in the Appendix at 29.

JURISDICTION

On January 13, 2006 the Kansas Court of Appeals filed its decision. On February 13, 2006, a Petition for Review was timely filed with the Kansas Supreme Court. On May 9, 2006, the Petition for Review was denied by the Kansas Supreme Court. This petition for certiorari was timely filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The fourteenth amendment to the United States Constitution.

STATEMENT OF THE CASE

The Petitioner Rachael (Nelson) Marsh and the Respondent Blain Nelson are the biological parents of a daughter born in 1995 and a son born in 2002. The intervenor in this case is Melissa McMullen, the paternal aunt of the children. In December 2003, Rachael filed for divorce. On March 30, 2004, during the pendency of the

divorce, Rachael and Blain signed a document in front of the magistrate judge entitled, "Agreed Custody Order," wherein it states that custody of the two minor children "shall be placed with a third party, their aunt, Melissa McMullen." Appendix at 3.

The order further states,

> "The parties agree that the third party placement is in the best interest of the minor children and shall continue until such time as there is a material change in circumstance, as defined by Kansas Statute, the cases decided by the Court of Appeals and Kansas Supreme Court, and each waive the claim of parental preference as to this placement during the minority of the children. Each party acknowledges that they have been advised by their counsel of the Kansas Constitutional provisions concerning parental preference towards their children and they each acknowledge that the facts and circumstances warrant the third party placement and that the third party placement is in the best interest of the minor children." Appendix at 4.

The parties agreed to "submit this plan to the District Court for final approval as their custody plan." On May 10, 2004, the parties were divorced and Agreed Custody Orders were signed by the district court judge. The Agreed Custody Orders signed on May 10, 2004 were basically a duplicate of the temporary orders signed by the magistrate judge on March 30, 2004. Appendix at 4. During the divorce hearing, Rachael and Blain acknowledged to the court that they understood all the terms of the custody agreement. Appendix at 9.

A Permanent Parenting Plan was also signed by the parties and the court. In the Permanent Parenting Plan, it states, "The parents have agreed at this time to place custody of the minor children with Melissa McMullen." It further states that custody is granted to Melissa McMullen because,

> "SRS has begun an investigation into each parent and to avoid any further issues, the parties are agreeing to custody with Melissa McMullen until the court finds a material change in circumstance warranting a change thereto." Appendix at 10.

On September 15, 2004, Rachael filed for custody of the children to change to her. Blain opposed custody being changed to Rachael. A Motion for Leave to Intervene was filed by the aunt, Melissa McMullen. Appendix at 4 and 5.

A pretrial hearing was held on January 7, 2005, wherein the validity of the waiver of the parental preference doctrine was considered by the court. Rachael testified that she entered into the custody agreement placing her children with their aunt Melissa because she was told by her attorney, the aunt, and the aunt's mother that if she didn't place the children with the aunt, SRS would file a child in need of care case, and take the children and place them in foster care with strangers. It was her understanding that the placement with the aunt would only be temporary until she got her life in order. Appendix at 5.

Rachael further testified that she signed the agreement and thought she understood what was entailed in waiving the parental preference doctrine. She testified that she was told by her attorney that she had to waive the parental preference doctrine in order to allow the aunt

to have the children temporarily. Appendix at 30. Rachael and her mother testified that Rachael's mother was present when she discussed this matter with her attorney and with the aunt. Rachael and her mother testified that the aunt told Rachael that if she did not let her have the kids temporarily, that SRS was in fact going to come and get the kids. Appendix at 8. At the time Rachael waived the parental preference doctrine, she did not believe it was a "big deal." Appendix at 5 and 30. Neither the aunt nor the aunt's mother ever took the stand to contradict any of the testimony given by Rachael.

At the hearing wherein Blain opposed custody changing to Rachael, Blaine's attorney acknowledged that Rachael had been told, "that if you did not agree, you and Blain, to a third-party placement, that SRS was in fact going to file a child in need of care petition on the children." Appendix at 32.

In a memorandum decision, the district court found that the parental preference doctrine as set out in *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), did not apply because there had been a valid waiver of the parental preference doctrine by Rachael. The court further found that the waiver by Rachael had knowingly and voluntarily been done without duress. Hence, Rachael would be required to show that a material change in circumstances had occurred that would warrant a change in custody. Appendix at 26 and 27.

At the final hearing on February 22-24, 2005, the district court found that Rachael had failed to demonstrate that a material change of circumstances had occurred. The court further found that it was in the children's best interest to stay with the aunt. Appendix at 6.

On January 13, 2006, the Kansas Court of Appeals agreed with the findings made by the district court and affirmed the decision. Appendix at 1. In addressing Rachael's argument that her waiver of the parental preference doctrine without notice to and consent of her minor children is contrary to public policy and a violation of the children's rights under the fourteenth amendment to the U.S. Constitution, the court stated, "Child custody is not a right which belongs to a child," and the appointment of a guardian ad litem is not mandated under these circumstances. Appendix at 12. On May 9, 2006, the Kansas Supreme Court denied Rachael's petition for review. Appendix at 29.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE KANSAS COURT OF APPEALS WHICH HELD THAT A WAIVER OF THE PARENTAL PREFERENCE DOCTRINE IS BINDING EVEN IF THE PARENT IS UNDER THE THREAT OF HAVING HER CHILDREN TAKEN AWAY FROM HER BY SOCIAL SERVICES IF SHE DOESN'T MAKE SUCH A WAIVER, IS AN IMPORTANT ISSUE THAT HAS NOT BEEN SETTLED BY THIS COURT, AND WILL HAVE DEVASTATING CONSEQUENCES ON PARENTS AND THEIR FUNDAMENTAL RIGHT TO RAISE THEIR CHILDREN.

Appellant requests the United States Supreme Court review the decision of the Court of Appeals of the State of Kansas, dated January 13, 2006, which states that a waiver of parental preference rights is enforceable against the parent even when the parent is coerced and under

duress due to the belief that SRS is going to remove the children and place them with strangers in foster care if the parent doesn't make such a waiver. The decision of the Court of Appeals is a misrepresentation of case law and is contrary to public policy. This ruling by the Kansas Court of Appeals encourages agencies and attorneys to coerce parents to waive their parental preference rights at a time when they are most vulnerable to manipulation, under duress and worried that if they don't do so, their children will be permanently removed from their custody.

A. When a parent is told that social services will file a child in need of care case unless her children are placed with a third party and she waives her parental preference rights, coercion and duress exists which would void a waiver of the parental preference doctrine by the parent.

The fourteenth amendment provides that no State shall deprive any person of life, liberty, or property, without due process of law. U.S. CONST. amend. XIV. The interest of parents in the care, custody, and control of their children – to establish a home and bring up children, control their education, nurture them and direct their destiny, and prepare them for additional obligations – is a fundamental liberty interest protected by the fourteenth amendment. *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

Time and time again, Kansas Appellate Courts have held that parental rights, not the child's best interests, control in custody disputes between parents and non-parents where the parent is fit. *In re Guardianship of Williams*, 245 Kan. 814, 819, 869 P.2d 661, 665 (1994).

The decision in *Williams* expressly overruled, *In re Marriage of Criqui*, 14 Kan. App.2d 672, 798 P.2d 69 (1990). Similar to the facts presented here, the mother in *Criqui* sought restoration of custody four (4) years after executing a document captioned "Parental Consent" and approving an "Agreed Order Chai ging Custody" entered by the court in which she acknowledged that it was in the best interests of her children that their full care, custody, and control be granted to their paternal aunts. At the time, the Kansas Court of Appeals determined that the express agreement of the parties took precedence over parental preference. In *Williams*, the Kansas Supreme Court pronounced *Criqui* clearly erroneous, concluding that the Court of Appeals had overlooked a long line of Kansas cases to the contrary when it determined that the parental preference doctrine did not apply when the parent seeking to regain custody had earlier relinquished legal custody by agreement. *See Williams*, 254 Kan. at 822-26, 869 P.2d at 667-69 (discussing *Christlieb v. Christlieb*, 179 Kan. 408, 295 P.2d 658 (1956); *Swarens v. Swarens*, 78 Kan. 682, 97 P. 968 (1908).

The court has held the parental preference doctrine controls against nonparents who have no permanent or legal right to the child's custody. The "legal right" referred to has been defined as a permanent legal relinquishment by adoption, severance of parental rights, or other appropriate proceedings terminating the parent-child relationship. The "legal right" referred to does not include court orders granting custody in divorce, guardianship, or similar proceedings where the parent-child relationship is not severed or terminated and the order is not permanent but one subject to reconsideration, modification, or termination by the court. *Williams* at 828.

In the present case, the Kansas Court of Appeals held that substantial competent evidence existed that supported the district court's finding that Rachael knowingly and voluntarily waived the parental preference doctrine. The Kansas Court of Appeals failed to consider the type of coercion that was used to get such a waiver, and the constitutionally significant duress that Rachael was under when she waived her parental preference rights.

The children could have been placed with the aunt or even another relative without the necessity of waiving these rights. But instead of this occurring, Rachael's own attorney, the aunt, and the aunt's mother, coerced Rachael into waiving her parental preference rights, saying that it was necessary to waive these rights to prevent the children from being placed with strangers. Rachael did not want her children placed with strangers; what mother would? Such tactics define duress, coercion, and deception. None of these tactics should be condoned by any court. However, this decision by the Kansas Court of Appeals does just that.

Whether alleged facts pleaded as constituting duress existed, is a question of fact. Whether the alleged facts are enough to constitute duress is a question of law. *Hastain v. Greenbaum*, 205 Kan. 475, 482, 470 P.2d 741 (1970). In Kansas where the trial court has made findings of fact and conclusions of law, the appellate court is to determine whether the trial court's findings of fact are supported by substantial competent evidence and whether the findings are sufficient to support the trial court's conclusions of law. *U.S.D. No. 233 v. Kansas Ass'n of American Educators*, 275 Kan. 313, 318, 64 P.3d 372 (2003). Substantial evidence has been defined as evidence which a reasonable person might accept as being sufficient to support a conclusion. *In*

re H.A.M., 25 Kan. App.2d 289, 296, 961 P.2d 716 (1998). The facts in this case constitute significant coercion and duress, and do not support the trial court's conclusions of law.

In order for a waiver of a constitutional right to be effective, it must be shown that the person knowingly and intelligently waived that right and that the person fully comprehended the significance of those rights and the consequences of waiving them. *In the Matter of B.M.B.*, 264 Kan. 417, 955 P.2d 1302 (1998).

Rachael testified that she approved the Agreed Custody Order under the belief that SRS was going to remove the children from her and her husband's (now ex-husband) care and custody if the children remained with either of them. Rachael testified that she was told this by her own attorney, the aunt, and the aunt's mother. Rachael's mother testified that she was present when Rachael was told this by her attorney, the aunt, and the aunt's mother. Rachael testified that she felt she had no other option and understood that the placement with the aunt would only be temporary until she got her life in order. Neither the aunt nor the aunt's mother ever took the stand to contradict that they provided such information to Rachael. Since the aunt failed to offer evidence or produce witnesses within her power to produce to contradict the testimony of Rachael, an inference arises that the evidence or testimony which would have been produced would have been adverse to her position. *Londerholm v. Unified School Dist. No. 500*, 199 Kan. 312, 430 P.2d 188 (1967); *Ready Mix Concrete Co. v. N.L.R.B.*, 81 F.3d 1546 (10th Cir. 1996).

At the hearing, the Respondent's own attorney, who was opposed to the change in custody, acknowledged

during questioning of Rachael, that Rachael had been told that if she did not agree to a third-party placement, that SRS was in fact going to file a child in need of care petition on the children. However, this was not true. Rachael later learned that she entered into the agreement and waived her parental preference rights based upon false information given to her by her attorney, the aunt and the aunt's mother. Rachael learned that SRS did not have plans for such a removal and was going to leave it up to the county attorney to decide what to do, if anything. When the social worker in charge of the case was specifically asked what would have happened with these kids if they hadn't gone to the aunt, she stated, "Well, I'm not sure."

In *Alires v. McGehee*, 277 Kan. 398, 409, 85 P.3d 1191, 1198 (2004), the court stated,

> "'competent parties may make contracts on their own terms, provided they are neither illegal ***nor contrary to public policy***, and that in the absence of fraud, ***mistake***, or ***duress*** a party who has fairly and voluntarily entered into such a contract is bound.'" *Id.*, 277 Kan. at 409, 85 P.3d at 1198 (quoting *Hamtil v. J.C. Nichols Real Estate*, 22 Kan. App.2d 809, 923 P.2d 513 (1996). (emphasis added).

This Court has held that agreements which are tainted by mistake, duress, or fraud are voidable if the innocent party so chooses. *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 118 S.Ct. 838 (1998). In the present case, Rachael was under duress and was coerced into waiving the parental preference doctrine and entering into the agreement. Case law states that if this has occurred, the party did not fairly and voluntarily enter into the agreement. The fact that Rachael did not fully comprehend

the significance of waiving the parental preference doctrine can be seen in her responses to questioning by the attorney for the Respondent. When Rachael was questioned as to why she thought waiving the parental preference doctrine wasn't any big deal, she responded by stating that it was explained to her "that it was just something we had to do to let Missy have them, the children, temporarily."

The Court discussed duress in *Garrity v. State of N.J.*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), stating:

> "Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other. It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called."

Rachael felt she had no other alternative but to place her children with a third party and waive the parental preference doctrine verses having the children taken from her and Blain's custody and placed with strangers. A voluntary, knowing, and intelligent waiver of the parental preference doctrine did not take place. Execution of an agreement under such circumstances, particularly when no basis exists, constitutes duress, warranting that the agreement be set aside. *See Graves v. O'Brien*, 111 Kan. 320, 207 P. 198 (1922).

B. It is contrary to public policy and a violation of a child's fourteenth amendment rights to allow for a parent's waiver of the parental preference doctrine without notice and consent of the minor child.

When the temporary and the original custody agreements were reached between the parties and accepted by the court, no notice and consent of the children was given, and no guardian ad litem was appointed. The Kansas Court of Appeals held, "There is no case law or statutory mandate which compels the appointment of a guardian ad litem for the minor children under the circumstances present here." Further, the court held, "Child custody is not a right which belongs to a child."

The question as to whether a parent can waive the parental preference doctrine without notice and the consent of the children is a question of law in which the appellate courts have unlimited review. *Barker v. Kruckenberg*, 33 Kan. App.2d 545, 105 P.3d 273 (2005). Whether enforcement of an agreement is contrary to public policy is a question of law in which unlimited appellate review exists. *Continental Western Ins. Co. v. KFS, Inc.*, 30 Kan. App.2d 1262, 1258, 59 P.3d 1 (2002). The court has stated that parties may entered into binding agreements with their own terms, so long as they are not contrary to public policy that is "well defined and dominant." *Id.* at 1269; *Alires*, 277 Kan. at 409, 85 P.3d at 1198 (2004).

It's true that an agreement is not necessarily against public policy because it waives a constitutional right. Normally, a person may agree to waive a constitutional right *unless* a question of public policy is involved. *Peck v. Horst*, 175 Kan. 479, 486, 264 P.2d 888 (1953). "A contract waiving constitutional or statutory rights or an

established rule of law is not void on the ground that it is against public policy *unless* it is injurious in some way to the interests of society." *Id.* at 487 (emphasis added). The public policy of a state is the law of that state as found in its constitution, its statutory enactments, and its judicial decisions; when the performance, formation, or object of an agreement is contrary to public policy, the contract is illegal. *Petty v. City of El Dorado*, 270 Kan. 847, 853-54, 19 P.3d 167, 172 (2001). Any purported waiver of parental preference, particularly without consent on the child's behalf, is contrary to the public policy of our country and should not be enforced.

"At the root of the parental preference doctrine is the recognition in Kansas that public policy deems the doctrine as being in the best interests of the child." *Williams* at 822. Rachael's children have a fundamental liberty interest, protected by the fourteenth amendment, to be raised by their Mother, as well as their father. The rights and interest of a child in his or her parentage – including child support, inheritance rights, family bonds, and accurate identification of his or her paternity – are due process rights which cannot be terminated or affected without notice and an opportunity to be heard. *Ferguson v. Winston*, 27 Kan. App.2d 34, 39, 996 P.2d 841, 846 (2000). In Kansas, the parental preference doctrine is rooted in the recognition that public policy deems maintenance of the familial relationship as being in a child's best interests. *Williams*, 254 Kan. at 822, 869 P.2d at 666.

"[T]he welfare of children is always a matter of paramount concern, but the policy of the state proceeds on the theory that their welfare can best be attained by leaving them in the custody of their parents and seeing to it that the parent's right thereto is not infringed upon or denied." *Kailer*, 123 Kan. 229, ___, 255 P. 41, 42. Further, when the

right belongs to the child, it cannot be terminated, even if by parental agreement. *In re Marriage of Schoby*, 269 Kan. 114, 117, 4 P.3d 604, 607 (2000) (quoting *Brady v. Brady*, 225 Kan. 485, 592 P.2d 865 (1979)).

When a case involves the unrepresented interests of an infant, the court has a duty to appoint a guardian ad litem or next friend to assure the protection of the child's interests. 42 AM. JUR. 2D *Infants* § 161 (2006). In the present case, no guardian ad litem approved the Agreed Order on the children's behalf, and accordingly, the Court cannot enforce any parental preference waiver without violating the children's due process rights and violating public policy that is "well defined and dominant." Such an issue has not been addressed by this Court, yet it affects the fundamental liberty interest of children everywhere. Because of its importance, the issue needs to be settled by this Court.

CONCLUSION

Based on the above arguments, the Petitioner requests the Supreme Court of the United States grant her Petition for a Writ of Certiorari and vacate the Kansas Court of Appeals judgment.

Respectfully submitted,

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No. 94,443

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

In the Matter of the Marriage of

RACHAEL NELSON, n/k/a RACHAEL MARSH,
Appellant,

and

BLAIN NELSON,
Appellee.

MELISSA McMULLEN,
Intervenor/Appellee.

SYLLABUS BY THE COURT

1.

Whether a child custody order is to be changed or modified rests with the sound judicial discretion of the trial court.

2.

In a custody modification proceeding, a trial court has the advantage of seeing the witnesses and parties, and its judgment may not be disturbed in the absence of an abuse of discretion.

3.

Basic rights of a parent to the care, custody, and control of his or her children are fundamental rights protected by the Fourteenth Amendment Due Process Clause. Parents have a constitutionally protected right to raise their children as they choose without excessive interference from the State.

4.

The parental preference doctrine is a firmly established rule in this state that a parent who is able to care for his or her children and desires to do so and who has not been found to be an unfit person to have their custody in an action or proceeding where the question is in issue, is entitled to the custody of his or her children as against others who have no permanent or legal right to their custody.

5.

A parent may waive his or her parental preference rights.

6.

When determining whether parental rights are knowingly waived, the appellate court must determine whether there is substantial competent evidence to support the district court's ruling.

7.

There is no case law or statutory mandate which compels the appointment of a guardian ad litem for minor children under the circumstances of this case.

8.

K.S.A.2004 Supp. 60-1610 controls child custody and residency. The statute indicates the court may change a prior custody order upon a showing of a material change in circumstances. A material change of circumstances has no precise definition, but it requires consideration of a variety of factors and circumstances and must be of a substantial

and continuing nature as to make the terms of the initial decree unreasonable.

Appeal from Norton District Court; WILLIAM B. ELLIOTT, judge. Opinion filed January 13, 2006. Affirmed.

Paula D. Hofaker, of Logan, for appellant.

Charles E. Worden, of Worden Law Office, of Norton, for appellee.

Daniel C. Walter, of Ryan, Walter & McClymont, Chartered, of Norton, for intervenor/appellee.

Before GREEN, P.J., LARSON, S.J., and WAHL, S.J.

WAHL, J.: Rachael and Blain Nelson were married on May 8, 1993. A daughter, C.N.N., was born in 1995, and a son, N.R.N., was born in 2002. Rachael and Blain separated frequently during the marriage and on December 23, 2003, Rachael filed for divorce. The parties, each represented by counsel, entered into agreed temporary orders which provided in relevant part that the parties would share equal time with the children and that Rachael would not allow the children to have contact with her boyfriend, Doug Marsh. Doug was charged in 1986 with engaging in sexually inappropriate contact with a 4-year-old boy and apparently entered into a diversion agreement as a result of the incident.

On March 9, 2004, Blain filed a motion for temporary custody, alleging that Rachael had violated the agreed temporary orders by refusing to allow him parenting time and by allowing the children to have contact with Doug. On March 30, 2004, a hearing was held wherein the parties signed custody orders agreeing that third-party

placement with Blain's sister, Melissa McMullen, was in the best interests of the children. The agreed custody orders also provided that the children were to have no contact with Doug. The agreed custody orders provided:

> "The parties agree that the third party placement is in the best interest of the minor children and shall continue until such time as there is a material change in circumstance, as defined by Kansas Statute, the cases decided by the Court of Appeals and Kansas Supreme Court, and each waive the claim of parental preference as to this placement during the minority of the children. Each party acknowledges that they have been advised by their counsel of the Kansas Constitutional provisions concerning parental preference towards their children and they each acknowledge that the facts and circumstances warrant the third party placement and that the third party placement is in the best interest of the minor children."

The agreed custody orders were approved by the district court and were signed by counsel and by Rachael and Blain.

On May 10, 2004, the divorce decree was filed. At this time, the parties also entered into a property settlement agreement and a permanent parenting plan which were approved by the district court and signed by both parties, further memorializing the parties' agreement to place custody of the children with Melissa.

Soon thereafter, Rachael and Doug married. On September 15, 2004, Rachael filed a motion for change of custody which included a request to terminate the condition that the children not be around Doug. In the motion,

Rachael argued that she was able to provide a stable environment for the children and that placement with her was in their best interests. Rachael also alleged that since the agreed custody orders had been entered into, she had completed a favorable parenting evaluation and that Doug had also completed an evaluation which indicated that there was no evidence of sexual deviance. Blain did not support Rachael's motion for a change in custody.

Melissa moved to intervene in the matter and also moved to have the action dismissed, contending that Rachael had failed to state facts which, if true, would demonstrate a material change of circumstances such that it was in the best interests of the children to change custody. The district court granted Melissa's motion to intervene but denied the motion to dismiss, as the court wished to further examine the parties' waiver of the parental preference doctrine. The court reserved the right to reconsider the motion at trial after receipt of all or a portion of the evidence.

On January 7, 2005, a pretrial hearing was held regarding the parties' waiver of the parental preference doctrine. At the hearing, Rachael testified that she entered into the custody agreement and waived the parental preference doctrine only because she thought that SRS was going to take the children and place them in foster care. Rachael claimed that she did not think that waiving the parental preference doctrine was a "big deal" at the time because she believed the arrangement to be temporary.

Following testimony, the district court concluded that the parental preference doctrine as set out in *Troxel v. Granville,* 530 U.S. 57, 147 L. Ed. 2d 49, 120 S. Ct. 2054

(2000), did not apply to this case because Rachael and Blain waived the doctrine when they agreed to grant custody to Melissa. The court held that Rachael had not been under duress and that she had knowingly and voluntarily waived her parental rights. The court noted that under the "parental presumption" doctrine, which stands for the notion "that parents act in the best interests of their children; as long as a parent is fit, there 'will normally be no reason for the state to inject itself into the private realm of the family.'" The court held that because there had been no showing of unfitness in the present case, it would be presumptuous, absent a material change in the circumstances, for the court "to inject itself into the private realm of the family and question the ability of Rachael Nelson Marsh and Blain Nelson to make a decision that was in the best interest of their minor children."

Melissa renewed her motion to dismiss Rachael's motion for change of custody, alleging that there had been no prima facie showing of a material change in circumstances. The court denied the motion in an attempt to allow the parties to fully address all issues in the case.

On February 22-24, 2005, a final hearing on the matter was held to determine whether there had been a material change in circumstances sufficient to justify a change in custody. Following testimony, Melissa moved for a directed judgment. The district court granted the motion, finding that Rachael had failed to demonstrate a material change of circumstances such that it was in the best interests of the minor children to change custody. The court ordered that the current parenting plan was to remain in effect and denied Rachael's request to vacate its previous order prohibiting the children from having any contact with Doug.

Rachael appeals, contending the district court erred in denying her motion to change custody. She alleges that the parental preference doctrine as set forth in *In re Guardianship of Williams,* 254 Kan. 814, 869 P.2d 661 (1994), requires the district court to award custody of the children to her.

Whether a child custody order is to be changed or modified rests with the sound judicial discretion of the trial court. *In re Marriage of Rayman,* 273 Kan. 996, 999, 47 P.3d 413 (2002). In a custody modification proceeding, a trial court has the advantage of seeing the witnesses and parties, and its judgment may not be disturbed in the absence of an abuse of discretion. *Talbot v. Pearson,* 32 Kan. App. 2d 336, 342-43, 82 P.3d 854 (2004). "Judicial discretion is abused only when no reasonable person would take the view adopted by the trial court. [Citations omitted.]" *Varney Business Services, Inc. v. Pottroff,* 275 Kan. 20, 44, 59 P.3d 1003 (2002).

Basic rights of a parent to the care, custody, and control of his or her children are fundamental rights protected by the Fourteenth Amendment Due Process Clause. The United States Supreme Court had long recognized that parents have a constitutionally protected right to raise their children as they choose without excessive interference from the State. See, *e.g., Troxel,* 530 U.S. at 65-66. The parental preference doctrine

> "is a firmly established rule in this state that a parent who is able to care for his or her children and desires to do so, and who has not been found to be an unfit person to have their custody in an action or proceeding where that question is in issue, is entitled to the custody of his or her children as against grandparents or others who have

> no permanent or legal right to the children's custody, even though at the time the natural parent seeks their custody such grandparents or others are giving the children proper and suitable care and have acquired an attachment for them." *Williams,* 254 Kan. 814, Syl. ¶ 2.

Rachael contends that, as a fit parent, she is entitled to custody over Melissa, a nonparent, based on the holding of *Williams.* Her argument ignores two important points. First, Blain supports the district court's ruling and prefers that custody remain with Melissa. Under K.S.A. 2004 Supp. 60-1610(a)(3)(B), "[n]either parent shall be considered to have a vested interest in the custody or residency of any child as against the other parent. . . ." Rachael is not automatically entitled to custody based on the holding in *Williams.* Most importantly, the *Williams* court did not consider a factual situation in which both parents had waived the parental preference doctrine. Here, the district court held that Rachael had expressly waived her parental preference rights.

Clearly, a parent may waive the parental preference doctrine. "It is beyond argument that 'all constitutional rights may be freely and voluntarily waived.'" *In re Habeas Corpus Application of Tolle,* 18 Kan. App. 2d 491, 496, 856 P.2d 944 (1993). The district court did not err in determining that the parental preference doctrine could be waived.

Rachael argues she did not knowingly waive her constitutional parental preference rights, claiming that she was under duress when she waived the rights. She contends she approved the agreed custody order only because she believed that SRS was going to remove the

children from her and Blain's care and custody if the children remained with either one of them.

When determining whether rights are knowingly waived, this court determines whether there is substantial competent evidence to support the district court's ruling. *State v. Donesay,* 265 Kan. 60, 68, 959 P.2d 862 (1998). The waiver of a statutory right involving the protected interests of parental rights should appear distinctly on the record. *In re H.D.W.,* No. 90,193, unpublished opinion filed February 13, 2004.

The record reflects that Rachael knowingly and voluntarily waived the parental preference doctrine. The decision to place custody of the children with Melissa was made in March 2004 when the parties signed the agreed custody orders. Those orders stated that the parties waived the parental preference doctrine and acknowledged that they had been advised by counsel "of the Kansas Constitutional provisions concerning parental preference" and "that the facts and circumstances warrant the third party placement and that the third party placement is in the best interest of the minor children." The signed permanent parenting plan was presented to the court on May 10, 2004. A transcript of the hearing on that date contains Rachael's testimony in response to questions by her attorney as to her understanding and agreement. It contains an in-depth questioning by the court as to her understanding and approval of the custody agreement. It contains testimony by Blain while Rachael was in the courtroom. Rachael testified that she understood it all and agreed to all the provisions. The parties' property settlement agreement referred to the parenting plan and custody order "that provides for third party custody of the minor children."

The decision to place custody of the children with Melissa was originally made in March 2004 when the parties entered into the agreed custody orders, and the permanent parenting plan was not adopted by the court until 2 months later. During this time, Rachael had the benefit of counsel, was questioned by her attorney and the court on the record, and was present in the courtroom while Blain was questioned by his attorney. Clearly, Rachael expressly waived her constitutional parental preference rights.

Also, the record does not support Rachael's argument that she was wrongly informed that SRS was going to remove the children from the home if they remained with her or Blain. The permanent parenting plan provided that "SRS has begun an investigation into each parent and to avoid any further issues, the parties are agreeing to custody with Melissa McMullen until the court finds a material change in circumstances warranting a change thereto."

There is substantial competent evidence to support the district court's finding that Rachael knowingly and voluntarily waived the parental preference doctrine.

Rachael also contends that her waiver of the parental preference doctrine without notice to and consent of her minor children is contrary to public policy and a violation of the children's rights under the Fourteenth Amendment to the United States Constitution. Specifically, she contends that the waiver was not valid because a guardian ad litem was not appointed to approve the custody orders on behalf of the children.

Rachael never raised this issue before the district court, nor did she request a guardian ad litem be appointed for her children. While the district court did raise the possibility of appointing a guardian ad litem during the January 7, 2005, hearing, one was never appointed and there is no indication in the record that Rachael ever objected to the district court's failure to do so. As such, any error could be considered invited by Rachael. "A party may not invite error and then complain of that error on appeal. [Citation omitted.]" *Butler County R.W.D. No. 8 v. Yates*, 275 Kan. 291, 296, 64 P.3d 357 (2003).

In order for this issue to be laid to rest, we shall briefly consider its merits, but Rachael still is not entitled to relief. She cites *Ferguson v. Winston*, 27 Kan. App. 2d 34, 996 P.2d 841 (2000), for the proposition that the rights and interests of a child in his or her own parentage are due process rights which cannot be terminated or affected without notice and an opportunity to be heard. Rachael's reliance on *Ferguson* is misplaced. There, the plaintiff brought an action to determine the parentage of an adult child, and the adult child was not made a party to the action. The trial court ordered a blood test without holding a *Ross* hearing and determined on the basis of the blood test alone that the plaintiff was not the child's father. This court reversed the ruling, questioning "the advocacy of determining the parent of a child who becomes an adult during the course of the litigation, who is not a party of the action and who is not represented by a guardian ad litem." 27 Kan. App. 2d at 35-36. The *Ferguson* court limited its ruling:

> "We do not, by this order, mean to infer that a child must always have an independent attorney and must always be independently made a party

> to a parentage action. We do hold, however, that when a child is an adult, he or she must be made a party to the action and must be represented by counsel before his or her parentage is determined." 27 Kan. App. 2d at 40.

In the present case, the children were not adults and the issue did not involve determining either child's parentage.

Rachael also improperly relies on *In re Marriage of Schoby,* 269 Kan. 114, 4 P.3d 604 (2000), for the proposition that when a right belongs to a child, it cannot be terminated even by parental agreement. *Schoby* involved a dispute over child support, which is a right of the child. 269 Kan. 114, Syl. ¶ 1. Child custody is not a right which belongs to a child. Further, the appointment of a guardian ad litem is not addressed in *Schoby.*

There is no case law or statutory mandate which compels the appointment of a guardian ad litem for minor children under the circumstances present here.

Lastly, we must determine whether the district court erred in finding that Rachael failed to show a material change in circumstances sufficient to justify changing the custody of the children.

K.S.A. 2004 Supp. 60-1610 controls child custody and residency. The court may change a prior custody order upon a showing of "a material change in circumstances." K.S.A. 2004 Supp. 60-1610(a)(2)(A). "A material change of circumstances" has no precise definition, but it requires consideration of a variety of facts and circumstances. *Johnson v. Stephenson,* 28 Kan. App. 2d 275, 280, 15 P.3d 359 (2000), *rev. denied* 271 Kan. 1036 (2001). A material change in circumstances must be of such a substantial and

continuing nature as to make the terms of the initial decree unreasonable. 28 Kan. App. 2d at 280.

In child custody cases, a court's paramount consideration is always the welfare and best interests of the child. K.S.A. 2004 Supp. 60-1610(a)(3); *In re Marriage of Whipp*, 265 Kan. 500, 506, 962 P.2d 1058 (1998). Additionally, K.S.A.2004 Supp. 60-1610(a)(3)(A) provides:

> "If the parties have entered into a parenting plan, it shall be presumed that the agreement is in the best interests of the child. This presumption may be overcome and the court may make a different order if the court makes specific findings of fact stating why the agreed parenting plan is not in the best interests of the child."

Rachael argues the district court erred in failing to find that a material change in circumstances had occurred which warrants a change in custody. Rachael points to several factors which she alleges constitute a material change in circumstances, including the fact that since she entered into the agreed custody orders, she has improved her living situation, she has a stable job, and she and Doug have both completed parenting evaluations. Rachael also contends that C.N.N. wants to live with her and is afraid of Melissa.

Essentially, Rachael asks this court to reweigh the evidence presented to the district court. However, this court does not weigh conflicting evidence, pass on credibility of witnesses, or redetermine questions of fact. *State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas*, 275 Kan. 763, 775, 69 P.3d 1087 (2003).

This court looks to evidence which supports the district court's findings and determines whether there is

substantial competent evidence to support those findings. "Substantial evidence is that which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. [Citation omitted.]" *U.S.D. No. 233 v. Kansas Ass'n of American Educators,* 275 Kan. 313, 318, 64 P.3d 372 (2003).

Emotional abuse of the children by both parents was substantiated in February 2004, and there was also evidence that spousal abuse had occurred. There was testimony in the record from workers at the High Plains Mental Health Center which suggested that Rachael was falsely reporting that C.N.N. was suffering from certain mental health issues. Additionally, one of the conditions of the agreed custody order was that the children were to have no contact with Doug Marsh. At the May 10, 2004, hearing, the district court stressed the seriousness of this condition with Rachael and she stated that she understood. Despite the seriousness of this obligation, Rachael subsequently married Doug.

Blain testified that the children were doing well in Melissa's care and he felt it was in their best interests to remain with her. There was also considerable testimony presented which indicated that since living with Melissa, C.N.N. is more social and her schoolwork has improved.

There is substantial competent evidence to support the district court's finding that there had been no material change in circumstances sufficient to warrant a change in the children's custody.

Affirmed.

IN THE DISTRICT COURT OF
NORTON COUNTY, KANSAS

In the Matter of the Marriage of:

RACHAEL NELSON, n/k/a
RACHAEL MARSH,

Petitioner, Case No. 2003-DM-135

and

BLAIN NELSON,

Respondent,

MEMORANDUM OF DECISION

(Filed Jan. 20, 2005)

NOW on this 11th day of January 2005, the above matter is reviewed by the Court in chambers.

On January 7, 2005, an evidentiary hearing was held and oral arguments were presented to the Court on three issues. Rachael Marsh, formerly known as Rachael Nelson or Rachael Nelson Marsh appeared in person and by and through her attorney Paula D. Hofaker. Blain Nelson appeared by and through his attorney Charles E. Worden. Intervener Melissa McMullen appeared in person and by and through her attorney Daniel C. Walter.

As a preliminary matter, I will note that counsel for the intervener is to prepare a journal entry relating to the motion to dismiss; counsel for the respondent Blain Nelson is to prepare a journal entry relating to a motion to exclude expert testimony. The primary issue that will be resolved in this memorandum relates to the parental preference doctrine.

Intervener Melissa McMullen refers to ***Troxel v. Granville***, 530 U.S. 57, 120 S.Ct 2054, 147 L.E.2d 49 (2000) as one of the touchstone cases that must be examined before this case can be resolved, and it is. Petitioner also cites that case as supporting her position. The right of parents to raise their children is without question constitutionally protected right, inherent in the Due Process Clause of the 14th amendment. However, although ***Troxel v. Granville*** refers to identifiable principles and maxims associated with the parental preference doctrine, that case is distinguishable from the instant proceedings, and nothing in these proceedings has violated the parents' right to raise their children, as guaranteed under the federal constitution.

The facts are that on December 23, 2003, petitioner, Rachael Nelson Marsh, filed a petition seeking a divorce from Blain Nelson. Two children had been born during the marriage, Christine Nicole Nelson, dob October 18, 1995, and Nathan Ray Nelson, dob April 8, 2002. Shortly after the petition was filed, Blain Nelson filed his answer alleging that the two children "resided with either the petitioner, respondent or the respondent's sister, Melissa McMullen, during the past five years." Thus the pleadings assert that Melissa McMullen established a relationship with these children, serving as their residential custodian before this case was ever filed. In addition, the fact that Melissa McMullen had been a residential custodian for the children prior to the filing of the divorce action was borne out during the testimony given by Rachael Nelson Marsh on January 7, 2005.

Whether Melissa McMullen had residency of the children before or after Rachael Nelson Marsh began her relationship with Douglas Marsh has not been established,

but on December 29, 2003, an agreed temporary order was entered, "that the petitioner (Rachael Nelson) will not have the children around Doug Marsh during the pendency of this action." The order was approved by counsel for petitioner and respondent.

For reasons that are not known to me, another Agreed Temporary Order was entered on January 12, 2004; once again that order was approved by counsel for both parties and it was also personally signed by petitioner and respondent, with each paragraph appearing to be individually initialed by Rachael Nelson. That order also contained language, "that the petitioner (Rachael Nelson) will not have the children around Doug Marsh."

After respondent alleged that Rachael Nelson had violated the temporary custody orders by allowing the children to be "around Doug Marsh", a third agreed custody order was entered on March 30, 2004, temporarily placing legal custody of the two minor children with "a third party, their aunt, Melissa McMullen." Once again, the children were placed, by agreement of the parties with a non-parent, Melissa McMullen, who both parties concede had a previous relationship with the children as their custodian.

A clause in the December 29, 2003, order further memorialized that "the parties agree that the third party placement is in the best interest of the minor children and shall continue until such time as there is a material change in circumstance, as defined by Kansas statute, the case is decided by the Court of Appeals and Kansas Supreme Court, and each waive the claim of parental preference as to this placement during the minority of the children. Each party acknowledges that they have been

advised by their counsel of the Kansas Constitutional provisions concerning parental preference towards their children and they each acknowledge that the facts and circumstances warrant a third party placement and the third party placement is in the best interest of the minor children." That March 30, 2004, order was signed not only by counsel, but by petitioner and respondent personally, and it remained in force until May 10, 2004, when the final divorce hearing was held.

Presented to the Court on May 10, 2004, was a permanent parenting plan, signed by the parties and their counsel wherein it was determined that "joint legal custody is not in the best interest of the children. The parents have agreed at this time to place custody of the minor children with Melissa McMullen." Hence, an agreed order was entered, and custody was granted to Melissa McMullen: "The parties are agreeing to custody with Melissa McMullen until the Court finds a material change in circumstance warranting a change thereto." That permanent parenting plan provided for parenting time with both the mother and father and afforded the parties mediation as a means to resolve disputes that might arise in the future. An additional provision in the parenting plan repeated that "the petitioner shall not have the children around Doug Marsh."

To further memorialize their agreement, as evidenced by the permanent parenting plan, on May 10, 2004, an agreed custody order was also submitted to the Court for approval. Once again, that agreed custody order was not only approved by both counsel but also personally approved by the respondent and petitioner. The agreed custody order directed placement of the children with their aunt Melissa McMullen and established child support to

be paid in favor of Melissa McMullen. For the fourth or fifth time, in the agreed order, the Doug Marsh issue was addressed, and the petitioner agreed that when she exercised parenting time she would not be around or near Doug Marsh until further order of the Court.

On the date the final agreed custody order was filed, May 10, 2004, a month and a half after the supplemental custody order was entered on March 30, 2004, the parties yet again acknowledged "that they have been advised by their counsel of the Kansas Constitutional provisions concerning parental preference towards their children and they each acknowledge that the facts and circumstances warrant the third party placement and that the third party placement is in the best interest of their minor children."

In addition, the property settlement agreement filed on May 10, 2004, substantiates the agreement of the parties, "that provides for third party custody of the minor children." In the property settlement agreement, each party acknowledged that he or she had consulted with legal counsel and that "they had sufficient opportunity to confer with his or her attorney with regard to the matters in this agreement, and has been fully advised of all relevant facts and circumstances." Paragraphs VI 2 and 4 of the property settlement agreement corroborate that the agreement is to be considered contractual between the parties and that the "agreement shall not be subsequently modified, except by mutual consent and agreement of the parties, expressed in writing, dated and signed." In addition at VI 7, "each party acknowledges that this agreement has been entered into voluntarily, without duress and with full disclosure of his or her assets and liabilities. Each

party believes this agreement to be valid, just and equitable."

An order for child support was entered on May 10, 2004, requiring the "petitioner and respondent to pay child support as reflected in the child support order and child support worksheet." That order repeats "(t)hat the parties have entered into an agreement that provides for third party custody of the minor children with Melissa McMullen."

A transcript of the May 10, 2004, hearing supports that the petitioner had full knowledge and understanding of the residential arrangements she was making for her two minor children. Page 4, Line 19 through Page 5, Line 19.

"Q. And those two children, we've entered into an agreement where they will be residing with a third party, is that correct?

A. Yes.

Q. And that third party is actually a sister to your husband?

A. Yes.

Q. As part of that, ma'am, we've reviewed and signed a parenting plan, is that correct?

A. Yes.

Q. And is that the parenting plan that we've agreed to?

A. Yes.

Q. Does your signature appear at the end of that?

A. Yes.

Q. And you're asking the Court to approve that today?

A. Yes.

Q. And because it's a third party, we also entered into an agreed custody order document, do you recall reading that?

A. Yes.

Q. And there is a change on that in Paragraph 4, and you understand that change, correct?

A. Yes.

Q. And you're asking the Court to approve that. Is your signature at the end of that?

A. Yes, it is.

Q. And is your husband's signature at the end of that?

A. Yes, it is."

As shown at page seven of the transcript, the Court asked questions of the petitioner because of the unusual nature of the residency arrangement.

"THE COURT: Okay, Ms. Nelson, you understand that it's rather unusual in these type of situations that the Court authorizes a placement of your children with a third party?

THE WITNESS: Yes, I do.

THE COURT: And I understand there are some peculiar circumstances in this case, those are somewhat

evidenced in the temporary custody order where it's shown that you have a relationship at present with Doug Marsh?

THE WITNESS: Yes.

THE COURT: And Mr. Marsh is not to have any contact with the children of any kind. That's been the dispute, apparently, between you and your husband, is that right?

THE WITNESS: Yes.

THE COURT: And you've agreed that in order for you to come in and seek residency of the children, or to seek a change in the parenting time, other than what might be authorized by Kansas statutes, that you're going to have to come in and show there has been a material change in circumstances?

THE WITNESS: Yes.

THE COURT: And you've agreed to that?

THE WITNESS: Yes.

THE COURT: Do you feel like you need any additional time to discuss with Mr. Baumgartner what constitutes a material change of circumstances?

THE WITNESS: No.

THE COURT: Do you understand that it's a pretty heavy burden for you to bear to come into court and show that there has been a material change in circumstances?

THE WITNESS: I understand."

Questions were also propounded to the respondent regarding residency and custody of the minor children, and all that questioning occurred while the petitioner was present in the courtroom. Page 10, Line 13 through Page 11, Line 6.

Q. You understand, also, that you're agreeing, and we talked about that this noon, that you could not petition the Court for any change unless there is a material change in circumstances?

A. I do.

Q. And we talked about the constitutional right of parent today?

A. Yes.

Q. And the parental preference rule requiring placement with a parent, unless there is a finding of unfitness, correct?

A. Right.

Q. And you're waiving all of that?

A. Yes.

Q. And in order for you to come back in, you'd have to show a material change of circumstances, and we went through some samples?

A. Yes.

Q. But they're not small ones, are they?

A. No.

The Court's findings on May 10, 2004, then included the following on page 13, line 4 through page 14, line 19.

"They also have asked the Court to approve a rather unusual parenting plan. The Court has heard testimony from both parties. The two minor children are presently with the respondent's sister, Melissa McMullen. Ms. McMullen has agreed to assume responsibility for raising those children as their parent, as a third party, but as their parent for all intents and purposes.

There are circumstances in this case which have led the parties to conclude that neither the petitioner nor the respondent should probably have residential custody at this time. Because of the circumstances as testified to and related today by counsel, the Court is going to approve the agreed custody order placing these children with Melissa McMullen. The parenting plan will be the one submitted by the parties, approved by each of them.

I'll simply remind Ms. Nelson that you need to understand that one of the specific conditions in the agreed custody order is that the children have no contact with Doug Marsh, do you understand that?

THE PETITIONER: Yeah.

THE COURT: That he isn't to be around those children under any circumstances, and you also need to understand that any matters concerning the children are subject to the court's continuing jurisdiction. What that means is that until Nathan Ray Nelson is 18 years of age and out of high school, which will be in about 16 years, it looks like, that I or a judge sitting in this position will have jurisdiction to decide what's in his best interest. So if it's alleged that you have had contact with Doug Marsh when the children were near Doug Marsh and it's a violation of the court's order, Mr. Nelson may be able to

come back into court and ask some additional sanctions or conditions be imposed upon you. Do you understand that?

THE PETITIONER: Uh-huh.

THE COURT: So you understand then the seriousness of your obligation not to have the children in contact with Mr. Marsh?

THE PETITIONER: I do."

The transcript on page 15, lines 10-14 also reflects that before concluding the proceedings, the Court inquired whether the parties or their attorneys had any questions.

"Do either of you have any questions? Mr. Nelson? Mrs. Nelson? Mr. Baumgartner? Mr. Worden?

MR. BAUMGARTNER: No, Your Honor.

MR. WORDEN: No further questions.

THE COURT: Thank You."

It is now evident that petitioner Rachael Nelson elected to marry Doug Marsh, in spite of the specific orders relating to Mr. Marsh not being present when Rachel Nelson Marsh exercised parenting time with the children. As of the time this order is written, there has not been any motion to amend any existing order relating to Mr. Marsh's presence when Rachael Nelson Marsh exercises her parenting time.

It is important to note that ***Troxel v. Granville*** not only refers to the parental preference doctrine, but it also confirms that there is a "parental presumption" doctrine that must be acknowledged. The parental presumption doctrine is that parents act in the best interest of their

children; as long as a parent is fit, there "will normally be no reason for the state to inject itself into the private realm of the family" to question a parent's decision making ability. See ***Troxel v. Granville*** at 120 S.Ct 2054, 2061.

There has been no showing of unfitness here. Rachael Marsh was not under duress when she signed the agreement. She might have been stressed about the fact that her children had been in the care of a third party for a considerable period of time or because she was in the process of concluding divorce proceedings, but there has been a complete failure to show that her signature to the documents mentioned by the Court in this memorandum, or her testimony as presented on May 10, 2004, or that her understanding and consent to the agreement was achieved through duress or over reaching. To the contrary, the record and evidence show that counsel for both parties went to significant efforts to advise their respective clients, and that at the end of the day the parents of Christine Nicole Nelson and Nathan Ray Nelson understood their rights before they made an informed, knowing, voluntarily and intelligent decision to place their children with Melissa McMullen. It would be presumptuous for this Court, absent a material change in circumstances, to inject itself into the private realm of the family and to question the ability of Rachael Nelson Marsh and Blain Nelson to make a decision that was in the best interest of their minor children. After all, Rachael Nelson Marsh entered into the agreements mentioned herein, and she proposed the court orders signed by this Court. She affirmatively sought court approval to place her children in the legal custody and residency of a third party, Melissa McMullen. Rachael Nelson has not shown that there was such a lack of understanding of the agreement as to taint the parenting

plan, agreed order or other written proceedings. She was represented by able and experienced counsel; she indicated she understood the proceedings and the ramifications of her actions and, when asked, responded that she did not need any additional time to discuss any of her activities with her attorney.

The testimony presented by Rachael Nelson Marsh on January 7, 2005, is diametrically opposed to what occurred on or before May 10, 2004. The reason for that is understandable. Having had additional time to consider her actions, petitioner wishes she had not agreed to allow Melissa McMullen to have custody of her children.

Under the circumstances presented to the Court, the parental preference doctrine does not apply in this situation. There was a valid waiver of the parental preference doctrine. That waiver was freely, knowingly, understandingly, voluntarily and intelligently made by both Rachael Nelson and Blain Nelson. The waiver of the parental preference doctrine is not of unlimited duration; instead that waiver applies only until such time as there is a material change of circumstances just as was explained by this Court to Rachael Nelson and Blain Nelson on May 10, 2004. Instead, the parental presumption doctrine applies, and absent a showing of unfitness or a material change in circumstances that has an effect on the best interest of the children, this court is loath to question the decision made by Rachael Marsh and Blain Nelson on May 10, 2004.

This Memorandum Decision and Order shall serve as the Order of the Court, no further journal entry being required.

IT IS SO ORDERED.

Dated this 11th day of January, 2005.

/s/ William B. Elliott [SEAL]
Hon. William B. Elliott, Chief Judge
17th Judicial District

CERTIFICATE OF MAILING

I do hereby certify that on this 20th day of January 2005, a true and correct copy of the above and foregoing MEMORANDUM OF DECISION was mailed, postage prepaid and properly addressed to:

Paula D. Hofaker
Attorney at Law
P.O. Box 482
Logan, KS 67646

Charles E. Worden
Attorney at Law
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Daniel C. Walter
Attorney at Law
P.O. Box 364
Norton, KS 67654

and the original was filed with the Clerk of the District Court, Norton County Courthouse, P.O. Box 70, Norton, KS 67654.

/s/ Janelle K. Morel
Janelle K. Morel Administrative Assistant
to Hon. William B. Elliott, Chief Judge

IN THE SUPREME COURT

OF THE STATE OF KANSAS

PAULA D HOFAKER
LAW OFFICE OF PAULA D HOFAKER PA
PO BOX 482
LOGAN KS 67646

CASE NO. 05-94443-A

IN THE MATTER OF THE MARRIAGE OF:
RACHAEL NELSON,
N/K/A RACHAEL MARSH, APPELLANT,
AND
BLAIN NELSON, APPELLEE.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT: PETITION FOR REVIEW BY RACHAEL NELSON N/K/A RACHEL MARSH. CONSIDERED BY THE COURT AND DENIED. RESPONSE NOTED.

DATE: 05/09/2006.

CAROL G. GREEN
CLERK

IN THE DISTRICT COURT OF
NORTON COUNTY, KANSAS

RACHAEL NELSON MARSH,	)	
Petitioner,	)	
-vs-	)	Case No. **2003-DM-135**
BLAIN NELSON,	)	
Respondent.	)	

TRANSCRIPT OF PROCEEDINGS

(Filed May 10, 2005)

PROCEEDINGS had before the Hon. William B. Elliott, Judge of the District Court of Norton County, held at Norton, Kansas, on the **7th day of January, 2005**.

* * *

[47] Q. What was your understanding that – did you think waiving the parental preference was any big deal?

A. It was my understanding at the time that, no, it was not. That it was something that we had to do to let Missy have them, the children, temporarily.

Q. For the court to approve the arrangement?

A. Yes.

Q. Now, you've been saying, now, it was my understanding at that time. You're saying that because we talked, haven't we?

A. Yes.

Q. Do you understand now the seriousness of such a thing?

A. Yes.

MRS. HOFAKER: I don't have any other questions.

THE COURT: Mr. Worden?

CROSS-EXAMINATION

BY MR. WORDEN:

Q. Missy has had your children before, has she not?

A. She had Cristine before, yes.

Q. You and Blain got, filed for divorce or got divorced one time, correct?

A. We were in proceedings; never went through.

Q. And at that time, the two of you took Cristine over [48] and she lived with Missy for a period of time, correct?

A. Yes.

Q. How long?

A. About one month.

Q. Okay. Did you sign any waivers of parental preference to have her go over there then?

A. No.

Q. So why would you say that the only reason you believed they would go with her is if you signed the parental preference? Haven't you had them there before?

A. Yes.

Q. Didn't Missy specifically tell you she wouldn't take these children unless you agreed to do this, so you couldn't just come back in and get them when you wanted them?

A. No, she did not.

Q. You do recall the conversation that if you did not agree, you and Blain, to a third-party placement, that S.R.S. was in fact going to file a child in need of care petition on the children?

A. Yes.

Q. You also agreed from the beginning of this case, from the temporary orders, that your children would not be around Doug Marsh, correct?

A. Yes.

Q. That order still continues today, correct?

* * *

(2)

No. 06-188

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In The

Supreme Court of the United States

RACHAEL NELSON
N/K/A RACHAEL MARSH,

Petitioner,

v.

BLAIN NELSON,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Kansas

BRIEF OF RESPONDENT IN OPPOSITION

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JURISDICTION

The Petitioner, Rachael (Nelson) Marsh has improperly attempted to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). As revealed under "**OPINIONS BELOW**" on page 1 of the Petition for Writ of Certiorari, there was no decision of a Federal Court of Appeals involved.

CONSTITUTIONAL PROVISION INVOLVED

This case does not involve the Fourteenth Amendment to the United States Constitution, nor, does it involve any other provision of the United States Constitution. It involves only non-constitutional findings of fact by a State Court.

STATEMENT OF THE CASE

The divorce between Rachael (Nelson) now Marsh and Blain Nelson was precipitated by an extramarital relationship that she had developed with Doug Marsh. What would otherwise be unremarkable is rendered significant by several things. Most importantly, in the mid 1980's, Doug Marsh was accused of sexually molesting a young boy while present in his mother's home where she ran a daycare business. Doug was confirmed to be a sexual abuser by the Kansas Department of Social and Rehabilitation Services (SRS) and was reported to the State's Central Registry. Further evidence indicated that Doug is low functioning intellectually, unemployable and a recovering alcoholic with at least one DUI conviction.

Both Rachael and Blain had also been confirmed by SRS as having emotionally abused the children. SRS scrutiny was heightened by Doug's presence in Rachael's life. Rachael herself, ran a daycare business in her home for a period of time. Doug was forbidden from being in the home. In addition, the County Health Department which supervised Rachael's daycare license had documented several health and safety concerns. Rachael's relationship with Doug had prompted SRS to consider taking action. In fact, as of the time Rachael and Blain were divorced, SRS had already spoken with the Norton County Attorney about the situation.

On December 29, 2003, an order was entered in the pending divorce action forbidding Doug Marsh from being around Rachael's and Blaine's children. The following March, Rachael agreed to temporary custody orders which placed the children in third party custody with Melissa McMullen (Intervenor), their paternal aunt. That arrangement was confirmed as a part of a permanent parenting plan agreed to by the parties and adopted by the Court on May 10, 2004. Before the agreement was approved, both parties were examined under oath by their attorneys. In addition, the Trial Judge questioned Rachael in-depth concerning her understanding of the agreement and the consequences thereof.

Shortly thereafter, Rachael Nelson married Doug Marsh and moved to change custody, claiming that the parental preference doctrine required the Trial Court to restore custody of the two minor children to her. Rachael claimed that she should be relieved of her waiver of the parental preference doctrine because she was under duress when she signed the agreement. She claimed that she did so only because she had been told by the Intervenor, and

her own attorney that if she did not do so, SRS would take the children from her. More specifically, Rachael recounted a visit from the Intervenor and the Intervenor's mother when she was told that if she didn't place the children with the aunt, SRS would file a child in need care case and take the children and place them in foster care with strangers. Although that was Rachael's initial testimony, on cross-examination she admitted that the Intervenor had come to her house out of concern for the fact that the kids might be split up and sent off to foster care if Rachael didn't do something else.

The parenting plan which was signed by both parties and their attorneys recited that:

> "SRS has begun an investigation into each parent and to avoid any further issues, the parties are agreeing to custody with Melissa McMullen until the Court finds a material change in circumstances warranting a change thereto."

Dorothy Lewis of SRS testified in substance that her agency was in a "wait and see" mode. Ultimately determining that when the children went to the Intervenor, there was no reason to proceed further on the Doug Marsh concern.

At a proceeding on January 11, 2005, the Trial Court made a factual determination that Rachael Marsh was not under duress when she signed the agreement waiving her parental preference doctrine and placing custody of her minor children with the Intervenor.

After hearing on the merits of the motion to change custody which occurred the following month, the Trial Court again concluded that there was a basis for Rachael's concerns that SRS might remove her children because of

substantiated abuse and Rachael's relationship with Doug Marsh. The Court said:

> "Ms. Marsh was aware of her rights and was aware of what she was doing and after being made aware of her rights, having been given knowledge of the, of what she was doing, understanding her position and her actions, then of her volition, voluntarily and knowingly and intelligently allowed for custody and residency of her children to be vested in her sister-in-law, Melissa McMullen. Once again, that is also as a result of the agreement, which agreement she entered into with her husband, now former husband, in the form of a parenting plan."

The Court ultimately denied Rachael's motion to change custody finding that there had been no material change of circumstances. Rachael appealed that decision to the Kansas Court of Appeals. On appeal, she raised for the first time, an assertion that it is contrary to public policy and a violation of a child's Fourteenth Amendment rights to allow for a parent's waiver of the parental preference doctrine without notice and consent of the minor child. The Court of Appeals noted the impropriety of raising that argument for the first time on appeal. Nevertheless, in an attempt to lay the issue to rest, the Court considered the merits of the argument and found that there were none.

From the adverse decision of the Kansas Court of Appeals, Rachael petitioned the Kansas Supreme Court for review. The petition was denied.

REASON FOR DENYING REVIEW

The duress issue:

28 U.S.C. § 1257(a) allows review by the United States Supreme Court of State Court decisions where a right or privilege is specially set up or claimed under the Constitution of the United States. Review of this case should be denied because no constitutional issue is presented. The petition for review is a thinly veiled and disingenuous attempt to convince the United States Supreme Court that it should review conflicting evidence on a factual determination made in a State Trial Court. The Kansas Court of Appeals refused to do so. This Honorable Court should do so as well.

The Petitioner does not actually claim a violation of her Fourteenth Amendment right to raise her children. Her argument is that the Trial Court and thus, the Court of Appeals incorrectly ruled on a factual issue whether she had validly waived that constitutional right. It is true that rights of a parent to the care, custody and control of his or her children are fundamental rights protected by the due process clause of the Fourteenth Amendment. ***Troxel v. Granville***, 530 U.S. 57, 147 L. Ed. 2d 49, 120 S.Ct. 2054 (2000). Kansas adheres to that rule. ***In re Guardianship of Williams***, 254 Kan. App. 14, 869 P.2d 661 (1994). Rachael's first problem is that, even if she were correct, she is not automatically entitled to custody. Under K.S.A. 2004 Supp. 60-1610(a)(3)(B) "Neither parent is considered to have a vested interest in the custody or residency of a child as against the other parent. Blain supports the District Court's ruling and prefers that custody remain with Melissa.

Furthermore, a parent may waive the parental preference doctrine, "It is beyond argument that 'All constitutional rights may be freely and voluntarily waived.'" ***In re Habeas Corpus Application of Tolle***, 18 Kan. App. 2d 491, 496, 856 P.2d 944 (1993).

Rachel does not contest that she waived the parental preference doctrine. Instead, she claims that she did so under duress. Undue influence or duress is a species of fraud which must be shown by clear, satisfactory and convincing evidence. ***Heck v. Archer***, 23 Kan. App. 2d 57, 927 P.2d 495 (1996). The Trial Court found that the weight of credible evidence balanced against Rachael. This was a factual determination. It was incumbent upon the Kansas Court of Appeals only to determine whether there was substantial competent evidence to support the District Court's ruling. ***State v. Donesay***, 265 Kan. 60, 959 P.2d 862 (1998). The Court of Appeals did so and found that there was indeed substantial competent evidence to support the finding that Rachael knowingly and voluntarily waived the parental preference rule.

Even if duress of some species existed, a threat of valid legal action is not duress within the meaning of the law. ***Browning v. Blaire***, 169 Kan. 139, 218 P.2d 233 (1950). ***U.S. Banking Co. v. Veale***, 84 Kan. 385, 114 P.2d 229 (1911).

Whatever pressure Rachael Nelson felt to waive the parental preference doctrine was self-induced. She must have known that there was some validity to the perceived threat that her children might be placed in foster care. She knew that she and Blaine had been both substantiated for earlier emotional abuse to the children. She also knew of SRS concerns about Doug Marsh. Additionally, she had

been cautioned by the County Health Department and reprimanded for leaving Doug Marsh alone with the children in her daycare. Indeed, SRS was maintaining a "wait and see" posture regarding the outcome of the divorce litigation. The obvious implication was that if custody was not resolved in the fashion that it was, other options would be considered.

The guardian ad litem issue:

Rachael's contention that public policy and the Fourteenth Amendment prohibit allowing a parent to waive the parental preference doctrine without the notice and consent of the minor child is frivolous. First of all, having failed to raise the issue before the Trial Court, this error, if any, was invited by Rachael. A party may not invite error and then complain on appeal. ***Butler County R.W.D. No. 8 v. Yates***, 275 Kan. 291, 64 P.3d 357 (2003). Rachael's argument centers on the failure of the Court to appoint a guardian ad litem for her children. There is no case law or statutory mandate which compels the appointment of a guardian ad litem under these circumstances. The parental preference doctrine creates a *prima facie* presumption that a parent has a constitutional right to raise his or her child. The right does not belong to the child. This case is not an adoption or a proceeding brought to otherwise terminate parental rights. It is a proceeding to determine with whom the children should live based upon their best interests as a consequence of a valid waiver of the parental preference rule.

CONCLUSION

Review of these findings by the United States Supreme Court is not warranted. No constitutional issues are presented. The Petitioner is attempting to secure ruling of an adverse factual determination in State Court. That does not provide a valid basis for review under 28 U.S.C. § 1257.

Respectfully submitted,

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